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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 121

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

NORTHWEST STEEL ROLLING MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 1, 1940
CERTIORARI GRANTED OCTOBER 14, 1940

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APPEARANCES:

For Petitioner:

HAROLD L. SCOTT, Esq.,

D. G. EGGERMAN, Esq.,

For Respondent:

B. H. NEBLETT, Esq.,

Docket No. 93249

NORTHWEST STEEL ROLLING MILLS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES:

1938

May 1—Petition received and filed. Taxpayer notified. (Fee paid)

May 2—Copy of petition served on General Counsel.

June 30—Answer filed by General Counsel.

June 30—Request for circuit hearing in Seattle, Washington, filed by General Counsel.

July 6—Notice issued placing proceeding on Seattle, Washington Calendar. Copy of answer and request served.

Aug. 1—Hearing set Sept. 19, 1938, Seattle, Washington.

1938

Sept. 24 & 27—Hearing had before Mr. Kern on merits. Submitted. Entry of Appearance of D. G. Eggerman filed. Petitioner's brief due 11/26/38 — respondent's due 1/25/39—reply due 2/9/39.

Oct. 13—Transcript of hearing of Sept. 24, 1938 filed.

Oct. 13—Transcript of hearing of Sept. 27, 1938 filed.

Nov. 8—Brief filed by taxpayer. 11/8/38 copy served on General Counsel.

1939

Jan. 25—Brief filed by General Counsel.

Feb. 16—Memorandum findings of fact and opinion rendered—John W. Kern, Division 16. Decision will be entered for the respondent.

Feb. 17—Decision entered—John W. Kern, Division 16.

May 10—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

May 10—Proof of service filed by taxpayer.

May 31—Praecipe for record filed by taxpayer.

June 5—Proof of service of praecipe filed by taxpayer. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 93249

NORTHWEST STEEL ROLLING MILLS, INC.,
4315 - 9th Avenue, N. W. Seattle, Washington.
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:6, JNW:90D), dated February 4, 1938, and as a basis of his proceeding alleges as follows:

Jurisdiction of the Board

1. The petitioner is a corporation organized under the laws of the State of Washington, with its principal office at 4315 9th Avenue, N. W., Seattle, Washington.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 4, 1938.

3. The taxes in controversy are income and surtaxes for the Calendar Year 1936 in the amount of Thirteen Thousand, Six Hundred Twenty-Eight Dollars and Twenty-Two Cents ($13,628.22).

Assignments of Error

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: [2]

(a) That the Commissioner of Internal Revenue has erred in claiming that the corporation is not entitled to a credit for dividends paid on account of the contract with the Seattle First National Bank, and with the State of Washington, under the provisions of Section 26(c) 2 of the Revenue Act of 1936.

Statement of Facts

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) That prior to May 1, 1936, the corporation agreed with the officers of the Seattle First National Bank that no funds could be used for the payment of dividends until the obligations due that bank were paid.

(b) Furthermore, the corporation in its contract with the State of Washington agreed that no dividends could be paid unless the corporation had surplus earnings available, and that at no time during the Year 1936 did the corporation have surplus available for the distribution of dividends.

Wherefore, Petitioner prays that the Board may hear and determine its appeal and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the

Board may deem fit and proper, and if the Board should find that the petitioner has overpaid its taxes for the year under review the Board may order and direct refund of said taxes overpaid with interest thereon.

HAROLD L. SCOTT
Counsel for Petitioner
500 Insurance Building,
Seattle, Washington [3]

State of Washington,
County of King—ss.

Harry Goetz, being duly sworn, says that he is the Treasurer of Northwest Steel Rolling Mills, Inc., a corporation organized under the laws of the State of Washington, the taxpayer named in the foregoing petition, and as such officer is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

HARRY GOETZ

Subscribed and sworn to before me this 27 day of April, 1938.

[Seal] GENE WOODS
Notary Public in and for the State of Washington, residing at Seattle. [4]

EXHIBIT A

Office of
Commissioner of Internal
Revenue

TREASURY DEPARTMENT
WASHINGTON

February 4, 1938

Northwest Steel Rolling Mills, Inc.,
4315 9th Avenue, N.W.,
Seattle, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936 discloses a deficiency of $13,628.22 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1936, notice is hereby given of the deficiency mentioned. Within ninety days, (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early as-

sessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By: Signed: CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870
Schedules 1, 1-A and 2. [5]

STATEMENT

IT:E:6
JMW-90D

In re: Northwest Steel Rolling Mills, Inc.,
4315 9th Avenue, N.W.,
Seattle, Washington.

Tax Liability for Taxable Year Ended
December 31, 1936.

Income Tax
Liability—$23,736.93.
Assessed—$10,108.71.
Deficiency—$13,628.22.

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated Septem-

ber 25, 1937; to your protest dated October 27, 1937 which relates to the disallowance of a dividend paid credit. and to the statements made at a conference held December 21, 1937 at the office of the internal revenue agent in charge.

On your return, line 30—"Credit for contracts restricting dividend payments"—you claimed a credit of $75,083.26. At January 1, 1936, you had an operating deficit of $75,083.26 and outstanding notes payable of $91,000.00 to the Seaboard Branch of the First National Bank of Seattle. You furnish an affidavit by C. L. Howell, Vice-President of that bank in which he states that loans were made to your company during the years 1927, 1928 and 1929; that no payments were made for several years and that in the year 1934 the bank insisted on monthly payments; that on January 17, 1934 the officials of your company agreed to make a monthly payment of $1,000.00 per month on account of principal; that these payments were continued until July 6, 1936, when the balance due of $85,000.00 was paid. He states also that the officers of your company were advised that the first funds over and above operating expenses must be used to pay off the notes; that any variation of such policy would immediately cause the bank to start suit on the notes and ask for a receiver; that at no time during the period prior to July 6, 1936, would the bank have allowed any funds to have been withdrawn from the corporation for other than actual operating expenses, and that no expenditures could have

been made for capital items or the payment of dividends in any manner whatever.

Section 26 of the Revenue Act of 1936 provides in part: [6]

> "In the case of a corporation the following credits shall be allowed - - - - - .
>
> (c) Contracts restricting payment of dividends - - -.
>
> (2) Disposition of profits of taxable year. An amount equal to the portion of the earnings of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of a taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside for the discharge of a debt, to the extent that such amount has been paid or set aside."

It will be noted that the act requires a written contract which expressly deals with the disposition of earnings and profits of a taxable year. In this connection you state in your protest dated October 27, 1937:

> "While it is agreed that there was no written contract in existence, there was a verbal contract between the officers of this company and the officers of the Seattle First National Bank, that funds could not be used for any other purpose than the payment of the notes as of January 1, 1936, amounting to $91,000.00."

It is believed that the verbal agreement does not satisfy the requirements of section 26(c) (2) of the Revenue Act of 1936 under which you claim the credit and the action of the internal revenue agent is sustained.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representative, Mr. H. L. Scott, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [7]

Northwest Steel Rolling Mills, Inc.
Taxable Year ended December 31, 1936.

Schedule 1

Adjustments to Net Income

Net income as disclosed by return		$75,124.71
As corrected		76,049.71
Net adjustment as computed below		$ 925.00
Unallowable deductions:		
(a) Peck & Hill Furniture Co. stock	$1,000.00	
Additional deductions:		
(b) Accrued capital stock tax	75.00	
Net adjustment as above		$ 925.00

Schedule 1-A

Explanation of Items

(a) In December 1929 you purchased some convertible preferred stock of the Peck & Hills Furniture Company at a cost of $1,000.00 which you charged off in 1936 and took as a deduction on your return for that year.

The facts developed in this case show that bankruptcy proceedings began in August 1933. No evidence has been presented as to the settlement with the stockholders, and the deduction claimed is disallowed for the reason that no loss in the year 1936 has been established.

(b) You made your return on the accrual basis and capital stock taxes accrued for the current taxable year are allowable deductions. [8]

Capital stock tax for capital stock tax year ended June 30, 1937, accrued July 1, 1936, (G.C.M. 17340, Cumulative Bulletin XV-2, page 81, year 1936)	$ 975.00
Capital stock deducted for capital stock tax year ended June 30, 1936, which accrued July 1, 1935 and was allowable as a deduction in the taxable year ended December 31, 1935 (G.C.M. 17340)	900.00
Additional deduction	$ 75.00

Schedule 2

Computation of Tax

Excess-Profits Tax

Net income for excess-profits tax computation	$76,049.71
Less:	
10% of $900,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1936	90,000.00
Net income subject to excess-profits tax	None
Excess-Profits tax	None
Excess-Profits tax assessed,	
Original, account #402067	None
Deficiency or overassessment of excess-profits tax	None

Normal Tax

Net income for income tax computation	$76,049.71
Normal tax net income	$76,049.71

[9]

8% of $ 2,000.00 (Over 0 to $ 2,000)	$ 160.00
11% of $13,000.00 (Over $ 2,000 to $15,000)	1,430.00
13% of $25,000.00 (Over $15,000 to $40,000)	3,250.00
15% of $36,049.71 (Over $40,000)	5,407.46
Total normal tax	$10,247.46

Surtax on Undistributed Profits

Net income for surtax computation		$76,049.71
Less:		
Normal tax		10,247.46
(a) Adjusted net income		$65,802.25
Less:		
Dividends paid credit	None	
Credit for contracts restricting dividend payments	None	None
(b) Undistributed net income		$65,802.25
(c) Remainder subject to surtax		$65,802.25
7% of $ 6,580.23 [Portion of (c) not over 10% of (a)]		$ 460.62
12% of $ 6,580.23 [Over 10% and not over 20% of (a)]		789.63
17% of $13,160.45 [Over 20% and not over 40% of (a)]		2,237.28
22% of $13,160.45 [Over 40% and not over 60% of (a)]		2,895.30
27% of $26,320.89 [Over 60% of (a)]		7,106.64
Amount of Tax		$13,489.47
Plus:		
7% of Specific Credit		None
Total surtax		$13,489.47
Normal tax		10,247.46
Total normal tax and surtax		$23,736.93
Normal tax and surtax assessed, Original, account #402067		10,108.71
Deficiency of income tax		$13,628.22

[Endorsed]: U.S.B.T.A. Filed May 2, 1938.

[10]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations of paragraph 1.
2. Admits the allegations of paragraph 2.
3. Admits that the taxes in controversy are income and surtaxes for the calendar year 1936. Denies the remaining allegations of paragraph 3.
4. Denies that the Commissioner committed the error alleged in subparagraph (a) of paragraph 4.
5. Denies the allegations of subparagraphs (a) and (b) of paragraph 5.

Denies generally and specifically each and every allegation contained in the petition and not hereinabove admitted, qualified or denied. [11]

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., $13.628.22.

[Signed] J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
JAMES C. MADDOX,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed June 30, 1938.

[12]

[Title of Board and Cause.]

H. L. Scott, Esq., and Donald G. Eggerman, Esq., for the petitioner.

B. H. Neblett, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in the income tax liability of petitioner, determined by respondent for the taxable year 1936 in the sum of $13,628.22. This deficiency results from respondent's disallowance of a credit of $75,085.26 for contracts restricting dividend payments claimed by the petitioner in computing its surtax on undistributed profits under section 26 of the Revenue Act of 1936. [13]

FINDINGS OF FACT.

Petitioner is a corporation which was organized in 1926 under the general corporation laws of the State of Washington, and receiving its charter to carry on business as a corporation from that State. Its principal place of business is Seattle, Washington.

Petitioner's surplus by appraisal at the beginning of 1936 was the sum of $134,173.90, and its surplus by appraisal at the end of that year was the same amount. Its operating deficit as of December 31, 1935 was the sum of $76,983.26, and its net income for the year ended December 31, 1936 was the sum of $76,049.71. From 1926 to 1936 petitioner was

indebted in considerable sums to the Seattle First National Bank, Seaboard Branch. This indebtedness was evidenced by notes due in ninety days which were from time to time renewed. The amount of this indebtedness at one time had been the sum of $150,000, but by January, 1934, had been reduced to the approximate sum of $115,000. The amount of this debt was subject to criticism by the bank examiners and the executive committee of the bank, and accordingly, when petitioner proposed to renew the notes evidencing this indebtedness in January, 1934, the officer of the bank who was handling this matter stated to the officers of petitioner that a condition of the renewal of these notes would be a payment by petitioner of $1,000 a month in a reduction of the principal amount of the indebtedness, together with the payment on this indebtedness of any available surplus in the treasury of petitioner after the payment of its current operating expenses. Petitioner was given to understand by the [14] officer of the bank in the course of these conversations that in case of a breach of this condition by petitioner the bank would apply for the appointment of a receiver for petitioner's assets. This condition to the renewal of these notes was not reduced to writing and no written contract was ever executed by petitioner which dealt with the payment of dividends. From January, 1934, to July, 1936, the amount of petitioner's indebtedness to the bank was reduced to the sum of $85,000, and this amount was paid on July 6, 1936.

OPINION.

Kern: The Sections of the Revenue Act of 1936 which are involved in this proceeding are section 14 (a)(2) and section 26 (c)(1)(2), which are set out in the margin.[1] [15]

---

[1]Sec. 14. Surtax on Undistributed Profits.

(a) Definitions.—As used in this title—

* * * * * * *

(2) The term "undistributed net income" means the adjusted net income minus the sum of the dividends paid credit provided by section 27 and the credit provided in section 26 (c), relating to contracts restricting dividends.

Sec. 26. Credits of Corporations.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

* * * * * * *

(c) Contracts Restricting Payment of Dividends.—

(1) Prohibition on payment of dividends.—An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions, only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account.

(2) Disposition of Profits of Taxable year.—An amount equal to the portion of the earnings and

Petitioner contends that its charter from the State of Washington, granted prior to May 1, 1936, and the general corporation laws of the State constitute a written contract entitling petitioner to the exemption under section 26 which we have set out above, since, under its charter and the laws of that State, it could not have legally paid dividends during the taxable years. It is petitioner's further contention that if the Act is construed in such a way as not to recognize the charter of a corporation and the laws of the state of its creation as a "written" contract within the meaning of the Act, then the Act is unconstitutional.

The oral agreement between petitioner and the bank, whereby all of the revenues of petitioner over and above its current operating expenses were to be applied to a reduction of its indebtedness to the bank, was, obviously, not "a written contract

---

profits of the taxable year which is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year) to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt); to the extent that such amount has been so paid or set aside. For the purposes of this paragraph, a requirement to pay or set aside an amount equal to a percentage of earnings and profits shall be considered a requirement to pay or set aside such percentage of earnings and profits. As used in this paragraph, the word "debt" does not include a debt incurred after April 30, 1936.

executed by the corporation" which "expressly deals with the payment of dividends" within the meaning of the Act, nor does petitioner so contend. Petitioner, however, contends that the Act, because it grants an exemption to a corporation obligated with regard to the non-payment of dividends under a written contract while it withholds such exemption from a corporation similarly obligated under an oral contract, is in violation of the Fifth Amendment, [16] and is, therefore, unconstitutional.

Similar contentions were made by the petitioner in Crane Johnson Co., 38 B.T.A. 1355, and were held by us to be without merit. Upon the authority of that case, therefore,

Decision will be entered for the respondent.

Entered Feb. 16, 1939. [17]

UNITED STATES BOARD OF TAX APPEALS
WASHINGTON

Docket No. 93249

NORTHWEST STEEL ROLLING MILLS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion, entered February 16, 1939, it is

Ordered and Decided: That there is a deficiency in income tax of $13,628.22 for the year 1936.

(Signed) JOHN W. KERN,
Member.

Entered Feb. 17, 1939. [18]

[Title of Board and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

Now comes Northwest Steel Rolling Mills, Inc., a corporation organized under the laws of the State of Washington, by its undersigned counsel and respectfully shows:

I.

Jurisdiction

Petitioner on review is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office in Seattle, Washington.

Respondent on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States of America, holding his office by virtue of the laws of the United States. [19]

Petitioner on review filed its income tax return for the calendar year 1936, with the Collector of Internal Revenue for the District of Washington and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

Thereafter, a controversy arose between Petitioner and Respondent in which Respondent claimed Petitioner was liable for a deficiency of income and surtaxes for the calendar year 1936, in the sum of Thirteen Thousand Six Hundred Twenty-eight Dollars and Twenty-two Cents ($13,628.22).

Petitioner appealed to the United States Board of Tax Appeals from the claim of deficiency of Respondent and under date of February 16, 1939, the United States Board of Tax Appeals entered findings of fact and opinion and decision favoring Respondent, Commissioner of Internal Revenue.

Petitioner *in* review files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II.

Nature of Controversy

Respondent claimed a deficiency against Petitioner resulting from Respondent's disallowance of a credit of $75,085.26 for contracts restricting dividend payments claimed by [20] Petitioner in computing its surtax on undistributed profits under Section 26 of the Revenue Act of 1936. Petitioner received its charter from the State of Washington

in the year 1926, and in 1936, was operating under said charter. On January 1, 1936, the company had a deficit in the amount of $76,983.26. On May 1, 1936, Petitioner owed Seattle-First National Bank the sum of $85,000.00 and during the year 1936, this indebtedness was paid. Petitioner had agreed with Seattle-First National Bank that no dividends could be paid until monies due the Seattle-First National Bank had been paid.

The taxable net income of Petitioner for the year 1936 was $76,049.71.

Petitioner contended that by reason of its oral agreement with the bank, it was prohibited from paying any dividends and further that Section 26 (c) (1), (2) grants an exemption to a corporation obligated with regard to non payment of dividends under a written contract while withholding such exemption from a corporation similarly obligated under an oral contract and is therefore in violation of the Fifth Amendment of the Constitution of the United States.

A further issue in the controversy involved the effect of the Uniform Business Corporation Act of the State of Washington and its provisions restricting corporations from distributing dividends under certain circumstances, Paragraph 3803-24 (2) to (5) inclusive of said Act being as follows: [21]

> "(2) Amounts of surplus arising from an unrealized appreciation or revaluation of fixed assets shall be shown on the books of the cor-

poration as a separate item apart from surplus profits or paid-in surplus.

"(3) In computing the aggregate of the assets of the corporation, the Board of Directors shall determine and make proper allowance for depreciation and depletion sustained, and losses of every character. Deferred assets and prepaid expenses shall be written off at least annually in proportion to their use as may be determined by the Board of Directors.

"(4) No corporation shall pay dividends, (a) in cash or property, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock, after deducting from such aggregate of its assets the amount by which such aggregate was increased by unrealized appreciation in value or revaluation of fixed assets; (b) in shares of the corporation, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock.

"(5) Cash dividends shall not be paid out of surplus due to or arising from, (a) any profit on treasury shares before resale; or (b) any unrealized profits due to increase in valuation of the inventories before sale; or (c) the unaccrued portion of unrealized profits on notes, bonds, or obligations for the payment of money purchased or acquired at a discount

unless such notes, bonds, or obligations are readily marketable, in which case they may be taken at their actual market value; or (d) the unaccrued or unearned portion of any realized profit in any form whatever, whether in form of notes, bonds, obligations for the payment of money, instalment sales, credits or otherwise."

Petitioner contended that under its charter with the state it could not have legally paid dividends during the taxable [22] year 1936, and is therefore exempt under Section 26 because of a written contract.

In the alternative, Petitioner contended that if the Act is construed in such a way as not to recognize the charter of a corporation and the laws of the state of the corporation's creation as a "written" contract within the meaning of the Act, then the Act is unconstitutional.

The Board of Tax Appeals rejected all of these contentions of Petitioner and entered a decision for Respondent.

III.

Assignments of Error

Petitioner on review avers that in the record and proceedings before the Board of Tax Appeals, and in the opinion and final decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of Petitioner who now assigns the following errors and each of them, which Petitioner avers occurred in said record, proceedings, findings, opinion, and

final decision so rendered and entered by the Board of Tax Appeals.

(1) The Board erred in entering a decision for Respondent resulting in a deficiency against Petitioner in the sum of $13,628.22.

(2) The Board erred in holding that the charter and general corporation laws of the State of Washington are not a written contract within the meaning of Section 26 of the Revenue Act of 1936. [23]

(3) The Board erred in denying Petitioner's contention that Section 26 of the Revenue Act of 1936 is invalid and unconstitutional insofar as it relates to Petitioner and to Petitioner's charter and contract with the State of Washington under which it is incorporated.

(4) The Board erred in refusing to sustain Petitioner's contention that Section 26 of the Revenue Act of 1936 is unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States of America because it grants an exemption to a corporation obligated with regard to the non-payment of dividends under a written contract while it withholds such exemption from a corporation similarly obligated under an oral contract.

(5) The Board erred in failing to redetermine Petitioner's income tax and surtax for the calendar year 1936, and to decide that there was no deficiency for said year.

(6) The Board erred in that its decision is not supported by the evidence and stipulation of facts and is contrary to law.

Wherefore, Petitioner on review respectfully petitions this Honorable Court that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors [24] complained of may be reviewed and corrected by said Court.

D. G. EGGERMAN
Counsel for Petitioner on Review

United States of America,
District of Washington—ss.

D. G. Eggerman, being duly sworn, says: That he is one of the attorneys for Petitioner on review and as such is duly authorized to verify the foregoing Petition for Review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

D. G. EGGERMAN

Subscribed and sworn to before me this 8 day of May, 1939.

[Notarial Seal] KATHRYN BENDER
Notary Public in and for the State of Washington, residing at Seattle.

My Commission expires Sept. 6, 1941.

[Endorsed]: U.S.B.T.A. Filed May 10, 1939. [25]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Commissioner of Internal Revenue, Washington, D. C.

To: B. H. Neblett, Esq.,
Joseph B. Harlacher, Esq.,
Hon. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue,
Appearing on behalf of Respondent, Commissioner of Internal Revenue:

You are hereby notified, that Northwest Steel Rolling Mills, Inc. did, on the 10 day of May, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board of Tax Appeals heretofore rendered in the above entitled case. A copy of the petition for review and of the assignments of error as filed with the Clerk of the Board of Tax Appeals is hereto attached and served upon you. [26]

Dated this 10 day of May, 1939.

D. G. EGGERMAN
Attorney for Petitioner on Review
Northwest Steel Rolling Mills, Inc.

Personal service of the above and foregoing Notice, together with a copy of the Petition for Review

and of the Assignments of Error mentioned therein, is hereby acknowledged this 10th day of May, 1939.

COMMISSIONER OF INTERNAL REVENUE
J. P. WENCHEL
Attorneys for Respondent,
Commissioner of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed May 10, 1939.
[27]

[Title of Board and Cause.]

REPORTER'S MINUTES
(Testimony)

Hearing at Seattle, Washington, on the 24th day of September, 1938, at 11 o'clock, a. m.

The above-entitled proceeding came on for hearing on this the 24th day of September, 1938, before the Honorable John W. Kern, Member of the United States Board of Tax Appeals, at Seattle, Washington, pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to-wit:

Appearances:

D. G. Eggerman, Esq., Exchange Building, Seattle, Washington, and H. L. Scott, Esq., Insurance Building, Seattle, Washington, appearing in behalf of Petitioner.

B. H. Neblett, Esq., Smith Tower, Seattle, Washington, and Joseph B. Harlacher, Esq., Smith Tower, Seattle, Washington, (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [28]

PROCEEDINGS

The Clerk: Case No. 93249, Northwest Steel Rolling Mills Company, Inc.

The Member: Please state your appearances for the record.

Mr. Eggerman: D. G. Eggerman. I do not appear on the petition, but Mr. Scott has asked that I join, and I spoke to Mr. Neblett about it.

The Clerk: Are you admitted to practice before the Board?

Mr. Eggerman: Yes, sir.

Mr. Neblett: B. H. Neblett, and Joseph B. Harlacher, for the respondent.

STATEMENT OF CASE ON BEHALF OF PETITIONER:

Mr. Eggerman: In this case, if the court please, it was my understanding last night that they had, but I am now informed that the government has not agreed to the exact amount of the deficit. But assuming that that will be agreed upon, the first three——

Mr. Neblett: Right on that point, Mr. Eggerman, I don't believe it can be agreed upon at this time. There is a question here, Your Honor, as to

the type of deficit, whether it is an adjustment deficit, or an operating deficit. If it is all in one book, we will ask that the book be put in.

Mr. Scott: If I could say a word there, this account, I [30] believe, could be reconciled. If we could say that on Wednesday morning we would enter the stipulation as to what the amount is, I don't think there will be any argument between us as to the exact amount. All we have to do is take the returns from the year 1926 and bring them down to date, taking into consideration the adjustments made by the agents in their various examinations, and adjust the figure.

The Member: Well, you are talking about a matter that I know nothing of. You mention the deficit, and I don't know in what way it is relevant or what kind of a deficit it is.

Mr. Eggerman: I will continue with my statement.

The first paragraph of the stipulation of facts to which the government agrees is that the taxpayer petitioner is a corporation under the general laws of the state of Washington, and received its charter in the year 1926, with its principal office at Seattle, Washington; that on January 1st, 1936, the company had a deficit in the amount of $76,983.36, the amount of that deficit has been referred to; third, that the taxable net income for the year 1936 was $76,049.71. In that connection, we assume, and I think Mr. Neblett will agree, that Your Honor takes judicial notice, and the Board takes

judicial notice of the statutes of the state of Washington. The statutes for convenience have been copied into the proposed stipulation of fact, under paragraph 7, with its [31] sub-sections. The facts which are not stipulated and which will not be stipulated, as I understand it, are referred to in the proposed stipulation of facts, 4 to 6 inclusive, namely, that on May 1st, 1936, the corporation owed to the Seattle-First National Bank, Seaboard Branch, the sum of $85,000. This, during the year 1936, this indebtedness was paid to the Seattle-First National Bank, Seaboard Branch. Sixth, that petitioner corporation had an oral contract with Seattle-First National Bank, Seaboard Branch, to the effect that no dividends could be paid until monies due the Seattle-First National Bank, Seaboard Branch, were paid.

Now, with respect to the stipulation of facts, 1 to 3, we believe that there will be and can be no issue of fact, between the petitioner and the government, save and except as to the paragraphs 4 to 6 inclusive, referring to the indebtedness to and the oral contract with the bank. The agent's report, Exhibits A and A-1, dated September 25, 1937, which report is referred to in the letter of the Commissioner, a copy of which is attached to our petition, and which is dated February 4, 1938, recites the amount of that deficit, the dates, the amount of the taxable income for the year 1936, and recognizes that the petitioner is a corporation or-

ganized under the general laws of the State of Washington, receiving its charter in 1936.

Our position is, if the court please, that practically [32] this entire case involves a pure question of law, namely, as to the exemption under Section 26 of the Revenue Act of 1936. Our position, in a nut-shell, is this, that prior to May 1, 1936, and thereafter, the petitioner was under an oral contract with its creditor, the Seattle-First National Bank, expressly preventing the distribution and payment of dividends. Second, that the corporation's charter from the state of Washington, which was granted prior to May 1, 1936, and the general corporation laws of the state of Washington, constitute a written contract entitling the corporation to the exemption under Section 26 of the Revenue Act. And, finally, if that section of the 1936 Act denies credit to the petitioner for an oral contract with its creditor, antedating the enactment of the law, it constitutes an arbitrary discrimination against the taxpayer already effectively bound by an oral contract in favor of a taxpayer bound by a written contract, and, furthermore, if it also denies credit for the contract with the state of Washington, which was in full force and effect on the 1st of May, 1936, which contract was evidenced not only by its charter but by the general law governing corporations of the state of Washington, it constitutes an illegal interference with state power, and in any event is unconstitutional.

If Mr. Neblett is agreeable to the [33] beginning of the introduction of evidence, I will proceed to introduce evidence on the relations with the bank.

STATEMENT OF CASE ON BEHALF OF RESPONDENT:

Mr. Neblett: Your Honor, I want to make just a short statement. Since opposing counsel has made more or less of an argument under the law, rather than a statement of facts, I will read the statute so that Your Honor may clearly understand the evidence as it is in relation to the act. It is an interesting question, Your Honor, as to the payment of dividends, and more or less a question of first impression. We do not have a Board case on it, nor are we able to find any Circuit Court case on it.

The Revenue Act of 1936 provides in part as follows:

"Section 14. Surtax on Undistributed Profits. (a) Definitions, as used in this title.

"2. The term 'undistributed net income' means adjusted net income minus the sum of the dividends paid, credits provided in Section 27, and the credits provided in Section 26(c) relating to contracts restricting dividends."

That 26 (c) is the one applicable here.

"Section 26, Credit of Corporations. In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax.

"(c) Contract restricting payments of dividends.

"(1) Prohibition payment of dividends. An amount equal [34] to the excess of the adjusted net income over the aggregate of the amounts which can be distributed in the taxable year as dividends without violating the provisions of a written contract."

That is the thing we want to call distinctly to Your Honor's attention, "without violating the provisions of a written contract, executed by the corporation prior to May 1st, 1936, which provision expressly deals with the payment of dividends."

Right on the threshold of this case, it is admitted there is no written contract as far as any specific contract referring to this particular transaction is concerned. They are trying to read the state law or the charter of the corporation, it being a written contract, but it is conceded that there is no written contract referring specifically to this particular transaction. In other words, they are going to try to prove an oral contract. It seems to show that they are not relying on a written contract.

Now, Article 26-2(b) of Regulation 94, relating to the Revenue Act of 1936, provides in part as follows:

"(b), Prohibition on payment of dividend. The credit provided in Section 26 (c) 1, is allowable only with respect to a written contract executed by the corporation prior to May 1st, 1936, which expressly deals with the payment of dividends, and operates as a legal restriction upon the cor- [35] poration as to the amounts which it can distribute within the taxable year as dividends."

That simply means, Your Honor, that if this corporation can show a contract restricting dividends and the amount of an assumed figure, say $10,000, then they are entitled to a credit of $10,000. That is all.

Now, the situation is this. No evidence of this oral contract with the bank is admissible here. The statute specifically says and calls for a written contract prior to May 1st, 1936. Now, that being the case, Your Honor, unless they can show a written contract, they can not proceed in this case.

However, Article 26-2 of Regulations 94, promulgated on the Revenue Act of 1936, expressly provides that the charter of a corporation does not constitute a written contract executed by the corporation within the meaning of Section 26(c). Furthermore, in IT306CB page 73, it has been held that a corporation is subject to the surtax imposed by Section 14 of the Revenue Act of 1936 on its distributed net income for 1936, even though the corporation is restricted by state law in declaring and paying dividends while its capital remains unimpaired.

Now, Your Honor, coming back to the facts in the case for just an instant. The government will stipulate two things in that proposed stipulation that Mr. Eggerman read [36] from. First, that the taxpayer is a corporation under the laws of the State of Washington receiving its charter in the year 1926, having its principal office at Seattle, Washington. Second, that the taxable net income for the year 1936 was $76,049.76. Now, with respect

to petitioner's proposed stipulation, that is all that respondent will agree to.

The Member: Call your witness.

CHARLES H. HOWELL

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. How long have you been an officer of the Seattle-First National Bank?

A. Well, prior to the First National it was the Seaboard National.

Q. Yes.

A. If you go back to the Seaboard National, which is a unit, of course, of the present organization since 1916.

Q. You are acquainted with the officers of the petitioner, the Northwest Steel Rolling Mills, are you not? A. I am.

Q. Who in your bank had charge of the loans and transactions with that corporation? [37]

A. I did.

Q. When did your bank's loans to the petitioner begin?

A. Loans in large figures, so to speak, started in '26. Previous to that they had small loans, ten and twenty thousand dollars.

Mr. Neblett: If Your Honor please, at this time I would like to ask Mr. Eggerman the purpose of this testimony.

(Testimony of Charles H. Howell.)

Mr. Eggerman: I have indicated in my opening statement that I expect to prove an oral contract. We are not arguing the law, I take it, today.

Mr. Neblett: That is all I wanted to know.

This line of testimony is objected to on the ground that the contract and certificate and dividends must be evidenced by a written contract. The petitioner is trying to prove an oral contract, which obviously is the furtherest possible direction from a written contract. In view of the statute, the wording of the statute, the written contract must have been in existence prior to May 1st, 1936, and all of this line of testimony is objected to as being incompetent, irrelevant and immaterial, because the statute required a written contract.

The Member: Well, the question that you raise on evidence, in objection to the evidence, is the sole question in the case, as I take it.

Mr. Neblett: That is about it.

The Member: If I should sustain your objection, the [38] petitioner would not be able to proceed in this proceeding along the theory that is his theory.

Mr. Eggerman: That is one of my theories, if Your Honor please.

The Member: I will overrule the objection, it being understood that it in no way indicates my ultimate decision in the case, but it certainly is a matter that I would want to have briefed and consider a little bit more fully than I can in making a snap judgment on an objection.

(Testimony of Charles H. Howell.)

Mr. Neblett: Exception allowed, Your Honor?

The Member: An exception will be allowed and will be borne in mind.

Mr. Eggerman: In view of counsel's objection, if Your Honor please, may I suggest to counsel, since he submits that the allegations in our proposed stipulation of fact, 4, 5, and 6, are wholly immaterial as a matter of law, why can't we shorten this proceeding by counsel admitting without waiving his objections as a matter of law the allegations in 4, 5, and 6, if he feels that it is incompetent, irrelevant and immaterial?

Mr. Neblett: Well, we prefer to proceed in our own fashion, Mr. Eggerman.

The Member: It will be understood that respondent objects to all questions that follow this line, and the objections will be overruled, and a general exception will [39] be granted.

Mr. Neblett: And based on the specific grounds heretofore raised on it?

The Member: Oh, yes.

Mr. Neblett: In order to protect the government completely in this case, as I understand it, the court is now indicating its intention to overrule any further objections made by respondent along this line?

The Member: That is correct.

Mr. Eggerman: I am quite willing that it be stipulated that your objections are considered to all this line of testimony

(Testimony of Charles H. Howell.)

By Mr. Eggerman:

Q. Tell us whether or not the Northwest Steel Rolling Mills was continuously indebted to your bank from, we will say, 1927, until July 6, 1936.

A. Yes, from 1926 to '36.

Q. Do you recall the maximum amount of that loan? A. $150,000.

Mr. Neblett: May we have on what date?

By Mr. Eggerman:

Q. What period was that?

A. It was in '26, 1926. I just don't recall. I have it there on the books, but it was in 1926.

Q. Now, on the 1st of January, 1936, did the Northwest [40] Steel Rolling Mills still owe the bank? A. Yes.

Q. And approximately in what amount?

A. I would have to refresh my——

Q. Can you tell us approximately?

A. They had paid before the depression came on this loan of $150,000, it was cut down to one hundred twenty-five, and then subsequently to one hundred fifteen, and there it stood for many years. Offhand, I think in '35 they agreed to make a thousand dollars a month reduction. Perhaps that was late in '34.

Q. At that time, do I understand that the indebtedness was about $115,000?

A. $115,000 was where it was when we made this effort to pay $1,000 a month.

Q. How was that loan evidenced, Mr. Howell?

A. A note of the Northwest Rolling Mills Company.

(Testimony of Charles H. Howell.)

Q. What would be the duration or maturity of it? A. Ninety days.

Q. Then it was subject to renewals each ninety days? A. Yes.

Q. Now, tell us whether or not the amount of that loan to the Northwest Steel Rolling Mills during the years that you say it remained unpaid and at about the same amount, was that subject to any criticism on the part of the bank [41] examiner?

A. Yes.

Q. And what about your note committee of the bank?

A. It was discussed rather often during that period when it remained fixed there for so many years, and criticized. I was on the defensive on it. I thought it would eventually work out. I recall one of the times one of the directors on the executive committee wanted to know if there was ever any chance of getting any money on that. I said, "Well, we could get the money by putting them out of business." He didn't want to do that, it was an old account with us, but that is indicative of how our executive committee regarded it, one of the examiners.

Q. Beginning with the first of the year, 1936, was there any monthly payments being received by the bank?

A. We got $1,000 a month, I think; maybe that started somewhat previous to '36, possibly.

Q. In the period that you have described, tell the court what, if any, conditions you as a representa-

(Testimony of Charles H. Howell.)

tive of the bank imposed upon the Northwest Steel Rolling Mills, as a condition to the repeated renewals of this paper?

A. There were two or three instances when they talked to me about some of the capital outlay; I think in one case concerning a piece of property adjoining, and they called me in in two or three instances. They talked to me about [42] getting another furnace that they needed, that they felt they needed in their business, and I told them under no circumstances should they do that until they paid us up.

Q. What, if anything, did you require of the Northwest Steel Rolling Mills to agree to with reference to any available funds over and above the necessary operating expenses?

A. Well, I don't believe we ever had any specific discussion of that. It was understood, of course, that they wouldn't under any circumstances permit——

Mr. Neblett: Objected to.

The Member: I sustain the objection and the answer will go out with reference to what was understood.

By Mr. Eggerman:

Q. Who did you have your conversations with with respect to this paper?

A. Usually with Mr. Herman Goetz.

Q. Ever with Mr. Emil Goetz and Mr. Harry Goetz? A. Yes, Harry Goetz.

(Testimony of Charles H. Howell.)

Q. In your conversations with any of these gentlemen of the Northwest Steel Rolling Mills, did you discuss what use was to be made of any available funds when and if they were available?

A. Well, we would, of course, expect any reduction or any money above operating costs or any profits, to be used towards reduction of our loan.

[43]

Q. Did you make that clear to them?

A. Oh, yes. One case, Mr. Goetz, when things got to going better with him, he thought they were going to be able to pay a dividend, and I says, "Well, you can't consider paying a dividend until you pay this note off."

Q. When was the note finally paid off?

A. I think in July last year, or '36, rather.

Q. 1936? A. Yes.

Q. What would the bank have done had Mr. Herman Goetz violated the instructions that you gave him with respect to disbursing money to the shareholders? A. Put it into receivership.

Cross Examination

By Mr. Neblett:

Q. Mr. Howell, I take it if the petitioner had come in at any time and offered to pay the loan to your bank, the bank would have accepted the loan and returned the note to the petitioner?

A. Gladly.

Q. There isn't any doubt about that?

A. No.

(Testimony of Charles H. Howell.)

Q. So this so-called oral contract restricting dividends could have been wiped out at any time by payment of the loan? [44]

Mr. Eggerman: We object to that as wholly speculative, incompetent, and immaterial.

The Member: Overruled.

A. No, we would have had no further say in it.

By Mr. Neblett:

Q. In the matter? A. No.

Q. If the taxpayer had not elected to proceed and declare a dividend, your bank had no written contract to rely upon in order to stop him, did you?

A. No. I should perhaps qualify that other answer in this way. If they were to continue borrowing operations, we would have had something to say about declaring dividends, even if they had paid us off.

Q. You might not have loaned them any more money, in other words. A. No.

Q. On the contrary, although you had no written contract, you elected to renew the loans from time to time? A. Yes.

Q. And you didn't have any writing from the taxpayer relative to these conversations you had with him about these loans? A. No.

Q. And as I understood you to say in your testimony in [45] chief, there was no specific understanding in respect to any oral agreement respecting this?

Mr. Eggerman: We object to that, if the court please, for the reason that the witness has testified

(Testimony of Charles H. Howell.)

to a specific conversation with Mr. Goetz with respect to dividends.

The Member: He testified to a specific conversation with him with regard to one specific proposal for one specific dividend.

Mr. Eggerman: I think that from the evidence was the only time that Mr. Goetz was ever optimistic enough to think of the possibility of dividends.

By Mr. Neblett:

Q. What is your answer?

A. No, no written agreement.

Q. There was no written agreement that these operating profits were to be used to pay the loans, was there? A. No written agreement.

Mr. Neblett: That is all.

Redirect Examination

By Mr. Eggerman:

Q. When counsel asked you with reference to whetner there was any specific agreement, and you gave the answer "no", did you mean no specific written agreement?

A. No specific written agreement, yes.

Q. You have known Mr. Herman Goetz and the members of [46] his family for a good many years, have you not? A. Yes.

Q. Had you reason to rely upon what they told you? A. Yes.

Q. Did you believe the promises, if any, that they made to you? A. Yes.

(Testimony of Charles H. Howell.)

Q. As the managing officer of the Seaboard Branch, and the man in contact with the Northwest Steel Rolling Mills, tell us whether or not you received periodically financial statements of the Northwest Steel Rolling Mills? A. Yes.

Q. Did you familiarize yourself with those statements from time to time? A. Yes.

Q. During the period you have described, while your note was bearing from $115,000 to $85,000 when it was paid off July 6, 1936, tell us, whether from the financial statements you had of the Northwest Steel Rolling Mills they were in a position to pay dividends?

Mr. Neblett: That is objected to, if Your Honor please.

The Member: Sustained.

Mr. Eggerman: Give us an exception.

The Member: Exception allowed. [47]

Mr. Eggerman: That is all.

Witness excused.

E. A. GOETZ,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. Are you one of the sons of Mr. Herman Goetz? A. I am.

(Testimony of E. A. Goetz.)

Q. Where is Mr. Herman Goetz today?

A. In the hospital.

Q. In what hospital?

A. St. Luke's Hospital.

Q. And suffering from what malady?

A. Heart attack.

Q. Has he been in failing health for some time?

A. He has.

Q. During the period from 1926 down to and including July 6, 1936, were you connected with the Northwest Steel Rolling Mills yourself?

A. With a short exception.

Q. You have heard the testimony of Mr. Howell, of the bank? A. I have. [48]

Q. Have you personally had anything to do with respect to the obligations owed by the Northwest Steel Rolling Mills to that bank? A. I have.

Q. What, if any, contacts have you had with Mr. Howell yourself?

A. They have been very numerous, executed notes in behalf of the Northwest Steel.

Q. With reference——

A. I talked to him about the general business conditions of the company.

Q. Was that during the period between the time the note was $115,000, testified to by Mr. Howell, and July 6th, 1936?

A. It was between the time that the note—most of my connections were from the inception of the company in 1926 until January 1st, 1934.

(Testimony of E. A. Goetz.)

Q. What if any conversations did you ever have with Mr. Howell at the times these notes were renewed, with respect to the conditions imposed upon the Northwest Steel Rolling Mills, if the notes were to be renewed? What if any conditions were imposed upon your company in conversations with you?

Mr. Neblett: That is objected to, Your Honor.

The Member: Sustained. [49]

A. The money was loaned to us on the condition that the notes were reecived——

The Member: Let that go out. What was said with regard to any condition.

By Mr. Eggerman:

Q. In substance, what did Mr. Howell say?

A. Mr. Howell told us the money was to be used for the current operating expenses only.

Q. What money are you referring to?

A. The money from these notes.

Q. And what did he say with respect to any available monies, as to what the company must do with any available monies if it made them?

A. The money was to be used to reduce the indebtedness.

Q. Well, from 1929 to 1934, the note was not increased, was it, Mr. Goetz? A. No, sir.

Q. Then you received no new money from the bank during those years? A. No, sir.

Q. It was a matter then of trying to repay what had been previously borrowed?

A. That is correct.

(Testimony of E. A. Goetz.)

Q. When you speak about the money that must be used for certain purposes, what money are you referring to, since [50] the money evidenced by the note had been loaned several years prior?

A. Any available money.

Q. Any available money in the treasury of the Northwest Steel Rolling Mills?

A. It was to be used for the current operating expenses only.

Q. And any surplus was to be used for what purpose? A. To repay the indebtedness.

Mr. Eggerman: That is all.

The Member: Any questions?

Cross Examination

By Mr. Neblett:

Q. Just one or two. You stated, Mr. Goetz, that you were with the company except for a short exception. What was the exception and why was it?

A. I was in California for a few months in '34.

Q. How many months?

A. Four months, I think.

Q. Were you disconnected from the business for that period of time? A. Yes, sir.

Q. Do you consider that you could have declared a dividend, Mr. Goetz, if you had wanted to pay the back note off at any time? [51]

Mr. Eggerman: Objected to as wholly speculative. If they were in financial condition to pay the note off, they wouldn't have any note with the bank obviously.

(Testimony of E. A. Goetz.)

The Member: I think that is a little argumentative. I will sustain the objection.

Mr. Neblett: If the note had been paid off, and you wanted to declare a dividend, Mr. Goetz, do you consider that you could have done so?

Mr. Eggerman: The same objection.

The Member: The same ruling. I don't think that counsel for the petitioner would claim that a restriction against dividend would exist after the payment of the notes. Am I correct in that?

Mr. Eggerman: That is quite true, as far as the bank was concerned.

Witness excused.

HARRY L. GOETZ,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. What period of time, Mr. Goetz, have you been active in the Northwest Steel Rolling Mills?

A. January 2nd, 1934, to the present date. [52]

Q. During that period of time what contacts have you had with the Seaboard Branch of the First National Bank with respect to the corporation's indebtedness to the bank?

(Testimony of Harry L. Goetz.)

A. Oh, we contact the bank probably once or twice a week.

Q. Have you any official position with the company?

A. I am vice-president and general manager today.

Q. And during what period of time were you such officer?

A. I have been the general manager since January 2nd, 1934.

Q. In these conversations with Mr. Howell, would Mr. Howell be the man you would contact?

A. Yes, sir.

Q. What, if anything, was said with respect to the requirements on the part of the bank to the Northwest Steel Rolling Mills?

A. My conversation was with him at the bank at all times, and was that he wanted us to pick up that note, so I agreed with him in January, January 2nd, that we would pay him a thousand dollars a month.

Q. And did you continue those monthly payments? A. Yes, sir.

Q. On July 6, 1936, what was the balance due?

A. $85,000.00. [53]

Q. And was the note paid at that time?

A. The note was paid on July 6.

Mr. Neblett: It is understood that our objection goes to all of this testimony?

The Member: Oh, yes.

(Testimony of Harry L. Goetz.)

By Mr. Eggerman:

Q. How were you able to retire the note on July 6, 1936? Was that out of earnings, or out of reduction of inventories, or how?

A. Our reductions of inventories.

Q. Had the company ever been in a position to pay the bank in full prior to that time?

A. No, sir.

Q. Had it ever been in a position to pay dividends? A. Not that I know of.

Q. It is alleged that the Northwest Steel Rolling Mills was suffering from a deficit? A. Yes, sir.

Q. How long had that deficit been accumulating, if you know?

A. Well, in my recollection, it had been accumulating right along.

Q. From the time you became general manager?

A. After I became general manager, we made no profits. (laughter) [54]

Q. Was the deficit greater when you became general manager than it was the 1st of January, 1936? A. Give me that question again.

Q. Was the deficit greater or less when you became general manager than it was January 1, 1936?

A. It was greater in 1934.

Q. Now, in these conversations with Mr. Howell of the bank, was there anything said by him as to a condition to the renewal of this note as to what must be done with any available monies over and above operating expenses?

A. He was always telling me that "If we have any excess money to pay the notes at the bank."

(Testimony of Harry L. Goetz.)

Mr. Eggerman: I believe that is all.

The Member: Any questions?

Mr. Neblett: No questions.

The Member: That is all.

Witness excused.

HAROLD L. SCOTT,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name to the court, Mr. Scott.

A. Harold L. Scott. [55]

Q. You are a resident of Seattle?

A. Yes, sir.

Q. And a certified public accountant?

A. Yes, sir.

Q. How long have you been such?

A. Since 1929.

Q. You are the Harold L. Scott who signed the petition in this case? A. Yes, sir.

Q. What connection have you had, Mr. Scott, with the matters involved in this case? What has been your connection with this case from its inception?

A. We have been the auditors for the Northwest Steel Rolling Mills, since the inception of the com-

(Testimony of Harold L. Scott.)

pany, except for a period of, I believe, three years, 1930, 1931 and '32, when no audits were made of the books, as far as I know.

Q. Did your firm prepare the income tax return for the Northwest Steel Rolling Mills for the calendar year 1936? A. Yes, sir.

Q. Have you audited the corporation's books for the year 1936? A. Yes, sir.

Q. Prior thereto. With what degree of familiarity then, can you say that you had with its books, particularly [56] as reflecting its financial position, beginning January 1st, 1936, and throughout that year?

A. I believe that we are familiar with the facts of their operations for that year.

Q. After the filing of the income tax return for that year, what further contact did you have in connection with the tax matters involved in this case?

A. During the fall of 1937 the internal revenue agent's office had Mr. Larson make an examination of the company's books, and the agent's report is dated September 25, 1937, forwarded to the taxpayer under the date of October 1st, 1937.

Q. And by whom is that report signed?

A. George C. Early, Internal Revenue Agent in charge.

Q. Tell us whether or not there are exhibits forming a part of that report. A. There are.

Q. Those are exhibits "A" and "A-1", are they not? A. They are included in the report.

(Testimony of Harold L. Scott.)

Q. Have you the original of Mr. Early's Exhibit "A" and "A-1"?

A. I have the copy that was mailed to the taxpayer. It is a carbon, but that is the only copy that the taxpayer received from the——

Q. Will you detach that and hand it to me, Mr. Scott? [57] I am referring to Exhibits "A" and "A-1". What subsequently occurred, Mr. Scott, with reference to the tax matter, after the receipt of that letter or that report, I should say?

A. I believe a protest was filed, and the case was forwarded to Washington, and the ninety-day letter was issued.

Q. Have you the letter from the Commissioner?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir. I have the Commissioner's letter dated February 4, 1938.

Q. Now, on reciept of Exhibits "A" and "A-1", and the letter of the Commissioner, dated February 4, 1938, did you examine the compilation with respect to the financial position of the Northwest Steel Rolling Mills during the year 1936, as stated in those two documents?

A. Yes, sir, and we agreed to it.

Mr. Neblett: That is objected to, Your Honor, as improper, as calling for an improper interpretation of the agent's report.

The Member: The question is, did he look into the financial condition of the company.

(Testimony of Harold L. Scott.)

Mr. Neblett: No objection.

The Member: All right. You may answer.

Q. Yes, I—on the schedule, Exhibit "A" it shows [58] the deficit at the beginning of the period, as amended, to be $76,000——

Mr. Neblett: Just a minute. Objected to, Your Honor.

The Member: Not responsive to the question.

Mr. Neblett: We——

The Member: It goes out as not responsive to the question.

By Mr. Eggerman:

Q. Is there any difference in the figures submitted by you as the accountant and C. P. A. and the compilation of figures in the documents "A", "A-1", and the Commissioner's letter?

Mr. Neblett: That is objected to.

The Member: Objection sustained, calling for a conclusion.

Mr. Eggerman: Give us an exception.

The Member: Exception is noted.

By Mr. Eggerman:

Q. Did you take any issue with the compilation of figures in the agent's report or in the Commissioner's letter?

Mr. Neblett: Objected to, Your Honor——

The Member: Objection sustained, on the ground it is irrelevant and immaterial.

By Mr. Eggerman: [59]

Q. Do you at this time make any issue as to the correctness of those figures?

(Testimony of Harold L. Scott.)

Mr. Neblett: I want to make this express suggestion, that question is asked for the sole purpose of circumventing your ruling.

The Member: The same objection, the same ruling.

Mr. Eggerman: I will state into the record that the petitioner adopts and has always adopted the same figures as shown in "A" and "A-1"——

Mr. Neblett: Are you *re*stifying? If you want to testify you take the stand.

The Member: Go ahead.

Mr. Eggerman: I object to counsel interrupting me.

(Mr. Eggerman's statement was read.)

Mr. Eggerman: —and the Commissioner's letter dated February 4, 1938, and adopts those figures for the purpose of this hearing.

The Member: Any other questions of this witness?

Mr. Eggerman: Yes.

By Mr. Eggerman:

Q. Have you the general ledger?

A. It is here in the room, yes, sir.

Q. Will you take the general ledger then, Mr. Scott? A. Yes.

The Member: Gentlemen, would it help at all—it is my [60] understanding that if the books are here and the government's accountant is here, and the petitioner's accountant is here, if there is any question with regard to figures, it seems to me it would be possible to get together on it. If it would help any, I will recess, gentlemen, and you can have

(Testimony of Harold L. Scott.)

a conference with regard to it, and the respondent can examine the petitioner's books here with regard to those figures.

Mr. Neblett: We will be very glad to try, Your Honor.

Mr. Eggerman: We understood that they had agreed.

The Member: I thought that it could be done in a short length of time. Do you have any other witnesses on any other point, except the financial condition of the company?

Mr. Eggerman: No, that is all.

The Member: Is the respondent going to introduce any witnesses? Is the corporate charter in evidence?

Mr. Eggerman: It is stipulated, if Your Honor please. We have the charter available.

The Member: I didn't know any stipulation had been filed.

Mr. Eggerman: The stipulation, counsel said he agreed that the taxpayer was a corporation, chartered under the general laws of the State of Washington, receiving a charter in the year 1926.

The Member: But the charter itself is not in evidence?

Mr. Eggerman: No, the charter is not in evidence. [61]

The Member: And I mention the fact for fear it was an oversight on the part of counsel.

Mr. Eggerman: I am quite willing to submit a copy of the charter if counsel is agreeable.

(Testimony of Harold L. Scott.)

The Member: I am not insisting. I thought it might have been an oversight in view of the fact that the stipulation was not adopted in whole.

The respondent has no further evidence?

Mr. Neblett: The respondent may want to introduce a return for the Northwest Steel Rolling Mills, Inc., but that won't take a minute.

The Member: I would suggest that it might be in the interest of time to continue this case, and give you a chance to have a little mutual auditing done.

Mr. Scott: I would suggest Wednesday morning.

The Member: I would rather not make it Wednesday. I will continue this matter until Tuesday morning.

Mr. Eggerman: At this time, if Your Honor please, I would like to submit and leave with Mr. Neblett, if he desires, the original Articles of Incorporation. I think it would probably be more help to the court. I will offer them in evidence, and ask the court, however, for the privilege of substituting a copy.

The Member: The exhibit will be admitted in evidence, and leave granted to substitute therefor a copy. [62]

Mr. Eggerman: And along with that we offer in evidence the authorization from the state of Washington, and statement of the filing of these Articles as of February, 1926, and request leave to substitute a copy.

(Testimony of Harold L. Scott.)

The Member: It will be admitted.

(The said Articles of Incorporation, and Certificate from the Department of State, so offered and received in evidence, were marked Petitioner's Exhibits 3 and 4 respectively, and made a part of this record.)

PETITIONER'S EXHIBIT 3

ARTICLES OF INCORPORATION OF NORTHWEST STEEL ROLLING MILLS, INC.

Know All Men by These Presents:

That we, Abe Goldberg, E. A. Goetz and James R. Stirrat, Jr., all being citizens of the United States and of the State of Washington and residing in the City of Seattle, Washington, do hereby associate ourselves together for the purpose of forming a corporation under the general incorporation laws of the State of Washington, to be known as "Northwest Steel Rolling Mills, Inc.," and for that purpose we do hereby certify and adopt the following, in triplicate, as our Articles of Incorporation:

Article I.

That the corporate name of this corporation shall be: Northwest Steel Rolling Mills, Inc.

Article II.

That the purposes and objects for which this corporation is formed are:

(Testimony of Harold L. Scott.)

First: To engage in the general steel rolling mill business and in the general steel and iron business; to purchase or otherwise acquire, construct, own, operate, sell and dispose of steel mills and plants; to manufacture, buy, sell and deal in rails, structural steel, shapes, forms, bolts, nuts and any and all steel and iron products and/ [70] or by-products, and to engage in every kind of trade or business incident thereto, including the purchase and sale of iron ores or minerals, pig iron, steel, steel ingots, scrap iron and scrap steel, coal, coke, manganese, and all other products necessary or convenient to be used in carrying on any of the branches of the business above set forth; to engage in the general steel furnace and iron ore smelting and reduction business, and the refining of iron ores and other minerals, and the production of pig iron, steel ingots and other similar products.

Second: To acquire by grant, purchase or otherwise, to own, hold, lease, prospect, develop, operate and manage, and to sell, convey, transfer, let or encumber mines, mineral locations and claims, lands containing coal and minerals, both base and precious, and mineral rights and privileges of every kind or character; and also to locate, appropriate, claim and acquire by patent or otherwise mining claims and mining rights and privileges, including mill sites and water rights from the United States or any other governmental authority, foreign or domestic, in the manner provided by law.

(Testimony of Harold L. Scott.)

Third: To acquire by grant, purchase, lease or otherwise, to construct, own, manage and operate and to convey, let or encumber mining, milling, concentrating, smelting, reduction, refining and washing plants for the mining, treatment and reduction of ores, minerals and coal and coke, together with all kinds of real and personal property, easements and privileges appertaining to said property and necessary or convenient to be used in connection therewith, and generally to transact and carry on any and all kinds of business in any manner connected with or incidental to the treatment of ores, minerals, coke and coal. [71]

Fourth: To acquire by purchase or lease, own, manage, improve, and to convey, let or encumber real and personal property of every kind, including timber and timber lands, tide lands, water front property, shore and riparian rights, bunkers, warehouses, docks, piers and wharves; and also to appropriate and acquire real property and rights and privileges of every kind therein from the United States, or any foreign governmental authority in accordance with the public laws thereof.

Fifth: To build, purchase, charter or otherwise acquire, to manage and operate and to transfer, let or encumber any and all kinds of steam and motor vessels, tug boats, barges, scows or other water craft, and to engage in a general transportation business therewith upon the waters of Puget Sound, British Columbia and Alaska, and the tributaries thereof.

(Testimony of Harold L. Scott.)

Sixth: To build, purchase, lease or otherwise acquire, and to equip, manage and operate railways, by steam, electricity or other power, and to convey, let or encumber the same, and to carry on and conduct a general transportation business as a private carrier.

Seventh: To acquire by purchase, grant or lease and to build, equip, operate, convey, let or encumber, trams, tramways, roads, trails and other private thoroughfares and all other means, equipment or devices for the conveying and handling of ores or minerals, and all supplies used in connection with the mining and smelting business.

Eighth: To acquire by purchase, lease or otherwise, to build, equip, manage and operate, and to convey, let or encumber canals, dams, ditches, sluices, flumes, acqueducts, reservoirs and other means of conveying and utilizing water for mining, reduction, power, transportation [72] and other useful purposes, including the acquisition and control of water rights under national, state, provincial, territorial or district laws.

Ninth: To acquire by grant, purchase or otherwise, and to plat, subdivide, sell, convey, lease or encumber townsites and the lots, blocks or subdivisions thereof, including the right to enter townsites under the Public Land Laws of the United States and to obtain title thereto.

Tenth: To acquire by purchase, lease or otherwise, to build, equip, manage and operate, and to convey, let or encumber power plants and plants for

(Testimony of Harold L. Scott.)

the manufacture and development of electricity for light, power, heat and other useful purposes, together with poles, wires, mains, conduits, circuits and all necessary equipment therefor, and to sell and supply electricity, heat, light or power to other persons or corporations.

Eleventh: To conduct and carry on the general business of merchants, manufacturers and dealers, and to buy, sell, bargain, change and deal in every kind of goods, wares and merchandise.

Twelfth: To acquire other businesses, whether conducted by corporation, association, partnership or individuals, and the good will, assets and property thereof, and to undertake and assume the whole or any part of the obligations of such corporation, association, partnership or individuals.

Thirteenth: To enter into any lawful arrangement for sharing profits, union of interests, reciprocal concession, or co-operation with any person, association, partnership or corporation carrying on or about to carry on any business which this corporation is authorized to carry on, so [73] as to directly or indirectly benefit this corporation.

Fourteenth: To borrow money for the business of the corporation and to give security therefor, and to that end to execute bonds, debentures, promissory notes or other evidences of indebtedness, and to secure the same by deed of trust, mortgage or pledge, of all or any part of the property of the corporation.

(Testimony of Harold L. Scott.)

Fifteenth: To exercise the right of eminent domain for any of the corporate purposes herein expressed whenever authorized by law relating thereto.

Sixteenth: To purchase or otherwise acquire, own, hold, sell or transfer the stocks, bonds or other evidences of interest in or obligation of any other person or corporation.

Seventeenth: To issue and exchange the paid up capital stock of this corporation, preferred and/or common, in payment for, at the reasonable value thereof, real and personal property and other assets of any existing business, whether corporate or otherwise, which is carrying on and conducting any of the branches of the business herein authorized to be carried on and conducted by this corporation.

Eighteenth: To buy or otherwise acquire, sell, lease or otherwise dispose of and deal in letters patent of the United States or of any foreign country, licenses, inventions, trade marks, trade names or secret processes and formulas useful or convenient in carrying on any of the branches of the business herein specified.

Nineteenth: To exercise such powers as are or may be granted or conferred by the general incorporation laws of the State of Washington, [74] and to do and perform all things necessary, proper or convenient for the carrying out of the objects and purposes herein specified.

Twentieth: In addition to the objects and purposes aforesaid, this corporation is formed for the

(Testimony of Harold L. Scott.)

purpose of engaging in and carrying on the business and exercising the powers hereinbefore specified outside of the State of Washington, and particularly in the District of Alaska and the Province of British Columbia, and for that purpose it is authorized to comply with the laws of the District of Alaska, or of any territory or district of the United States, or of any foreign province or territory in relation to foreign companies doing business therein.

Twenty-first: The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of this corporation.

Article III.

At any time after the expiration of three years from the date of this incorporation, the Trustees of this corporation, upon being authorized so to do by a majority of the stockholders thereof, shall have the right to sell and dispose of all the property and assets of this corporation at a fair price therefor as fully and to the same extent as though such sale was authorized by the unanimous vote of all the stockholders of this corporation.

Article IV.

The capital stock of this corporation shall be two hundred thousand dollars ($200,000) divided into two thousand (2,000) shares of the par value of one hundred dollars ($100.00) each. [75]

Article V.

That the time of the existence of this corporation shall be fifty years from and after the date of its incorporation.

Article VI.

That the number of Trustees of this corporation who shall manage the concerns of this corporation until the second Monday of May, 1926, shall be four and their names and addresses are: Abe Goldberg, James R. Stirrat, Herman Goetz and C. F. Riddell, all of the City of Seattle, in the State of Washington.

The stockholders of this corporation may, at any annual meeting thereof, or at any special meeting called for that purpose, by a majority vote increase the number of Trustees of this corporation to any number not exceeding nine (9) without the necessity of amending these Articles therefor.

Article VII.

The principal office and place of business of this corporation shall be in the City of Seattle, County of King and State of Washington, but meetings of the Board of Trustees may be held outside of said State of Washington at such place or places as may from time to time be provided by resolution of the Board of Trustees of this corporation or by the By-laws of this corporation.

In Witness Whereof, we, the incorporators above named have hereunto set our hands and seals to

(Testimony of Harold L. Scott.)

these presents, in triplicate, this 11th day of February, 1926.

(Signed) ABE GOLDBERG, [Seal]
E. A. GOETZ [Seal]
JAMES R. STIRRAT [Seal]

[76]

State of Washington,
County of King—ss.

This is to certify, that on this 11th day of February, 1926, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Abe Goldberg, E. A. Goetz and James R. Stirrat, Jr., to me known to be the individuals described in and who executed the within Articles of Incorporation, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

Signed J. E. PETERSON,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Admitted in evidence Sept. 27, 1938.

[77]

(Testimony of Harold L. Scott.)

PETITIONER'S EXHIBIT 4

S. F. No. 1421—1922 Approved as to Form by Department of Efficiency. 721.

The Seal of the State of Washington 1889

Article No. 60181 Domestic

Department of State
Olympia
Office of the
Secretary of State

I, J. Grant Hinkle, Secretary of State of the State of Washington, do hereby certify that Articles of Incorporation of the Northwest Steel Rolling Mills, Inc., a Domestic Corporation, of Seattle, Washington, were, on the 13th day of February, A. D. 1926, at 9:06 o'clock A. M., filed for record in this office and now remain on file herein, being duly recorded in Book 139, at page 388, Domestic Corporations.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington.

Done at the Capitol, at Olympia, this 20th day of March, A. D. 1926.

[Seal] J. GRANT HINKLE,
Secretary of State.

By (s) A. M. KITTO,
Assistant Secretary of State.

[Endorsed]: Admitted in evidence Sept. 24, 1938.

[78]

Mr. Neblett: The respondent would like to stipulate and place in the record right now that the Northwest Steel Rolling Mills, Inc., for the calendar year 1936, filed a return, and that return shows surplus by appraisal at the beginning of 1936, $134,-173.90, and at the end of the year, 1936, $134,173.90.

The Member: No objection to that offered stipulation? Is it agreeable to you?

Mr. Eggerman: I am leaving that to Mr. Scott.

Mr. Scott: Yes, that is agreeable.

The Member: The record will show those figures as stipulated by and between the parties

Mr. Neblett: Could I find out what the number of the petitioner's exhibits are, and what they are?

The Member: The ones that have been admitted are 3 and [63] 4 having to do with the corporate charter and certain documents executed by the State of Washington on the occasion of the granting of the charter, as I understand it. 1 and 2 were the agent's report and the ninety-day letter, were they not?

Mr. Eggerman: Yes, sir. They were not admitted in evidence.

The Member: That is all of the evidence on the part of both petitioner and respondent, with the exception of certain matters having to do with the interpretation of the books of the company?

Mr. Neblett: That is correct, Your Honor.

The Member: And I understand that the parties will be able to, after an examination of the books, stipulate probably, in all probability, as to the books of the company?

Mr. Neblett: I think that is correct, Your Honor.

Mr. Scott: There is only one question involved. That is the amount of the deficit.

The Member: I ask that because I don't want to spend any time at all with this Tuesday morning, because I have a case set on that morning that will take all day, and also a case which has been continued for the completion of evidence to that morning, but this case will be continued until the morning of Tuesday, September 27th, at 9:30.

Mr. Eggerman: If Your Honor please, in the event, which [64] I think is remote, I cannot stipulate, I will offer in evidence 1 and 2 Tuesday morning. I think it is unnecessary to encumber the record prior to that. They can be stipulated.

The Member: We will take a recess.

(Whereupon, at 11:30 o'clock a. m., the hearing in the above entitled matter was adjourned to Tuesday, September 27, 1938, at 9:30 o'clock a. m.) [65]

REPORTER'S MINUTES

Hearing at Room 117 Federal Office Building on the 27th day of September, 1938, at 9:30 o'clock *p.*m.

The above-entitled proceeding came on for hearing on this the 27th day of September, 1938, before the Honorable John W. Kern, Member of the United States Board of Tax Appeals, at Seattle, Washington, pursuant to notice of hearing hereto-

fore given; whereupon the following proceedings were had and testimony heard, to-wit:

Appearances:

H. L. Scott, Esq., (Exchange Bldg., Seattle, Wash.) Appearing on behalf of Petitioner.

Donald G. Eggerman, 1824-27 Exchange Bldg., Seattle, Wash., appearing on behalf of Petitioner.

B. H. Neblett, Esq., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [66]

PROCEEDINGS

The Member: The other case is the Northwest Steel Rolling Mills.

Mr. Eggerman: May the record show, if the Court please, in accord with your Honor's opinion Saturday that we are now substituting the copy of the articles of incorporation which is Exhibit 3, I believe.

Mr. Neblett: I have no objection, your Honor.

The Court: All right. Leave will be granted for substituting.

The Clerk: One and two weren't admitted.

Mr. Eggerman: No. they haven't been offered yet.

The Member: Now, will counsel acquaint me with what is before the Board at the present time?

Mr. Neblett: Well, if your Honor please, when we adjourned the last time the question about the

amount of operating deficits was the only question left undetermined then.

The Member: Yes.

Mr. Neblett: The respondent now stipulates that the petitioner had an operating deficit as of December 31, 1935, of $76,983.26.

The Member: That stipulation is agreed to by the petitioner? [67]

Mr. Scott: It is.

The Member: Is there anything else, gentlemen, in regard to this case?

Mr. Scott: Yes, I believe that we should stipulate that the taxable income for the year 1936 was $76,049.71.

Mr. Neblett: I think that has already been done. Let me check that one thing.

The Member: Yes.

Mr. Neblett: It may be so stipulated, your Honor.

The Member: All right. Is there anything else now? If that is all, gentlemen, the clerk will announce the date of filing briefs, and I think you may add, if there is no objection, on account of the number of these cases that are coming up, it will relieve the congestion on the part of the respondent's counsel and I think it will probably be a convenience to him if we add 30 days to the usual time of filing of briefs if there is no objection on the part of petitioner.

Mr. Eggerman: No objection.

The Clerk: Petitioner's brief is due November 26th. Respondent's brief is due January 25th. Petitioner's [68] answer is due February 9th.

Mr. Neblett: Your Honor, before we proceed could I ask Mr. Scott to read off that income figure once more so that I can have a double check on that figure?

Mr. Scott: $76,049.71.

Mr. Neblett: That is O.K.

(Hearing Concluded) [69]

[Title of Board and Cause.]

PRAECIPE FOR RECORD ON APPEAL

To: Clerk of the United States Board of Tax Appeals:

You Will Please Prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the 9th Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the 9th Circuit, heretofore filed on behalf of Northwest Steel Rolling Mills, Inc.:

(1) Docket entries;

(2) Pleadings,
   (a) Petition
   (b) Answer to Petition
   (c) Stipulation of Facts;

(3) Transcript of evidence and proceedings at hearing;

(4) Memorandum Findings of Fact and Opinion, entered February 16, 1939;

(5) Decision;

(6) Petition for Review;
(7) Notice of Filing Petition for Review;
(8) Praecipe for Record;
(9) Exhibits 3 and 4.

D. G. EGGERMAN,
Counsel for Appellant. [79]

Service of a copy of the within Praecipe, together with a copy of the proposed Transcript of Evidence and Proceedings on Hearing, is hereby admitted this 5th day of May, 1939.

J. P. WENCHEL,
Counsel for Respondent.

[Endorsed]: U.S.B.T.A. Filed May 31, 1939. [80]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 80, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of June, 1939.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9207. United States Circuit Court of Appeals for the Ninth Circuit. Northwest Steel Rolling Mills, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed June 17, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals

No. 9207

NORTHWEST STEEL ROLLING MILLS, INC., a corporation,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

DESIGNATION OF POINTS ON APPEAL AND OF RECORD TO BE PRINTED.

To: Hon. Paul P. O'Brien, Clerk, United States Circuit Court of Appeals:

You will please be advised that Northwest Steel Rolling Mills, Inc., Petitioner on Review, designates as the points on which it intends to rely on the appeal, the following:

I.

That the Board of Tax Appeals erred in entering a decision for Respondent, resulting in a deficiency against Petitioner in the sum of $13,628.22.

II.

That the Board of Tax Appeals erred in holding that the charter and general corporation laws of the State of Washington are not a written contract within the meaning of Section 26 of the Revenue Act of 1936.

III.

That the Board of Tax Appeals erred in denying Petitioner's contention that Section 26 of the Revenue Act of 1936 is invalid and unconstitutional, insofar as it relates to Petitioner and to Petitioner's charter and contract with the State of Washington under which it is incorporated.

IV.

That the Board of Tax Appeals erred in refusing to sustain Petitioner's contention that Section 26 of the Revenue Act of 1936 is unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States of America because it grants an exemption to a corporation obligated with regard to the non-payment of dividends under a written contract while it withholds such exemption from a corporation similarly obligated under an oral contract.

V.

That the Board of Tax Appeals erred in failing to redetermine Petitioner's income tax and surtax for the calendar year 1936 and to decide that there was no deficiency for said year.

VI.

That the Board of Tax Appeals erred in that its decision is not supported by the evidence and stipulation of facts and is contrary to law.

That Petitioner on Review designates the entire record as being necessary for the consideration of the appeal herein.

Dated this 22d day of June, 1939.

W. S. LEATHOUSE,
Counsel for Petitioner on Review, Northwest Steel Rolling Mills, Inc.

[Endorsed]: Filed June 24, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, December 5, 1939

Before GARRECHT, HANEY, and STEPHENS, Circuit Judges

Order of submission

Ordered petition to review in above cause argued by Mr. Walter S. Greathouse, counsel for petitioner, and by Mr. James P. Garland, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

Upon consideration of the application of Messrs. Robert L. Judd and Harry O. Glasser to file brief as Amici Curiae herein, and good cause therefor appearing, ordered application granted, and brief ten[d]ered therewith filed.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, March 1, 1940

Before GARRECHT, HANEY, and STEPHENS, Circuit Judges

Order directing filing of opinion and dissenting opinion, and filing and recording of judgment

By direction of the Court, ordered that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9207. Mar. 1, 1940

NORTHWEST STEEL ROLLING MILLS, INC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals

Before GARRECHT, HANEY, and STEPHENS, Circuit Judges.

STEPHENS, Circuit Judge: This appeal involves the question of the validity of a levy of a surtax under the Revenue Act of 1936 [c. 690, 49 Stat. 1648] upon the undistributed profits of the taxpayer. The

taxpayer contends that it is entitled to a credit under Section 26 of the Act, which reads in part as follows:

"Sec. 26. Credits of Corporations.

"In the case of a corporation, the following credits shall be allowed to the extent provided in the various sections imposing tax— * * *

"(c) Contracts restricting payment of dividends—

"(1) Prohibition on payment of dividends—An amount equal to the excess of the adjusted net income over the aggregate of the amount which can be distributed in the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. * * *

"(2) Disposition of profits of taxable year—An amount equal to the portion of the earnings and profit of the taxable year which it is required (by a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the disposition of earnings and profits of the taxable year to be paid within the taxable year in discharge of a debt, or to be irrevocably set aside within the taxable year for the discharge of a debt); to the extent that such amount has been so paid or set aside. * * *"

Taxpayer is a Washington corporation, with its principal place of business in that State. From 1926 to 1936 the taxpayer was indebted to a Seattle bank, which indebtedness was evidenced by 90-day notes which were renewed from time to time. The original indebtedness amounted to $150,000.00, but by January 1934, it had been reduced to approximately $115,000.00. In January 1934, when the taxpayer proposed to renew the notes the bank officers conditioned the renewal of the notes on the payment by the taxpayer of $1,000 a month in reduction of the principal amount thereof, together with the payment on the indebtedness of any available surplus in taxpayer's treasury after the payment of its current operating expenses. Taxpayer was given to understand by the bank that any breach of this condition would result in the bank's having a receiver appointed for the taxpayer's assets. This condition to the renewal of these notes was not reduced to writing. From January 1934, to July 1936, the amount of taxpayer's indebtedness to the bank was reduced to the sum of $85,000.00, and this amount was paid on July 6, 1936.

Throughout the year 1936 the general incorporation laws of the State of Washington provided in part as follows [Uniform Business Corporation Act, Laws of 1933, p. 785, sec. 24, of the State of Wash.; Rem. Rev. Stat. 3803–24]:

"In computing the aggregate of the assets of the corporation, the Board of Directors shall determine and make proper allowance for depreciation and depletion sustained, and losses of every character. Deferred assets and prepaid expenses shall be written off, at least annually in proportion to their use as may be determined by the Board of Directors.

"4. No corporation shall pay dividends,

"a. In cash or property, except from the surplus of the aggregate of its liabilities, including in the latter the amount of its capital stock, after deducting from such aggregate of its assets the amount by which such aggregate was increased by unrealized appreciation in value or revaluation of fixed assets; * * *"

As of December 31, 1935, the taxpayer's operating deficit was $76,983.26. Its net income for 1936 was $76,049.71. At the beginning of the year 1936 the taxpayer had a surplus by appraisal of $134,173.90.

Taxpayer first relies upon the oral contract with the bank under which it agreed to apply all available surplus to the principal of its notes. The contention is that the Revenue Act unreasonably discriminates between written and oral contracts expressly providing for disposition of earnings and profits in discharge of a debt, and that it therefore violates the Fifth Amendment of the United States Constitution. We think there is a rational basis for the distinction between written and oral contracts. As stated by the respondent in its brief, "It is a comparatively easy matter for the Bureau of Internal Revenue to ascertain whether an ordinary written contract prohibits payment of dividends. But it would be an almost insuperable burden for the Bureau to determine the validity and scope of oral contracts of that nature."

Taxpayer next relies upon the Washington statutes prohibiting payment of dividends except out of profits. The contentions are, first, that the Congress intended to include a corporate charter as a "written contract," and, second, that if the Act is construed not to include a corporate charter as a written contract, the Act is unconstitutional.

The respondent argues that the taxpayer has failed to prove that it could not legally have paid dividends during the taxable year 1936. It points to the "surplus by appraisal" at the beginning of 1936, and states in its brief, "Certainly the mere fact that taxpayer had an operating deficit at the beginning of the year would not prevent it from declaring dividends out of its profits during the taxable year so long as it had sufficient surplus and the record does not show that it did not. * * * the record does show 'surplus by appraisal' of some $134,000 and that would be more than sufficient to cover a dividend of $76,000 unless such surplus was created by 'unrealized appreciation in value or revealuation of fixed assets' and the record does not show that it was."

We think that the taxpayer has proved that it could not have legally paid the dividends. There is no dispute but that the deficit had accumulated from January 2, 1934. And furthermore, the taxpayer's vice-president and general manager testified:

"Q. Had the company ever been in a position to pay the bank in full prior to that time?

"A. No, sir.

"Q. Had it ever been in a position to pay dividends?

"A. Not that I know of."

Respondent's claim that this evidence cannot be considered because of the fact hat it is a conclusion of the witness is without merit, as the evidence was admitted without objection, and being undisputed it constitutes proof of the fact.

This brings us to a consideration of the question of whether the Revenue Act of 1936 should be construed as including taxpayer's charter as a "written contract executed by the corporation prior to May 1, 1936" which "expressly deals with the payment of dividends."

It is contended by the respondent that even assuming that the charter might be construed to be a "contract executed by the corporation," it does not "expressly deal with" the payment of dividends. This was the holding of the Circuit Court of Appeals for the Eighth Circuit in Crane-Johnson Co. v. Commissioner, 105 Fed. (2d) 740 (1939), wherein the court said that "if there is such a contract, it is not an express one, but is implied."

In our opinion the Crane-Johnson case confuses the wording of the statute in question, that is, "a written contract executed by the corporation prior to May 1, 1936 which provision expressly deals with the payment of dividends."

It is settled law that—

"Laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms."

Farmers Bank v. Fed. Reserve Bank, 262 U. S. 649, 660. See also Von Hoffman v. Quincy, 4 Wall. 535, 550.

Aside from that, the taxpayer's articles of incorporation "expressly" refer to the general incorporation laws of the State of Washington, as follows:

"That the purposes and objects for which this corporation is formed are:

* * * * * * *

"Nineteenth. To exercise such powers as are or may be granted or conferred by the general incorporation laws of the State of Washington * * *."

The object of our search, therefore, is to see whether or not the laws of the State of Washington, which are so incorporated into the taxpayer's character, "expressly deal(s) with" the payment of dividends.

It is suggested that since the law is general and does not refer in particular to the taxable year in question, it does not comply with the wording of the statute requiring the contract to "expressly deal with the payment of dividends." This construction of the statute is too narrow. The mere fact that the statute prohibits the payment of dividends during any year in which there is a deficit, certainly cannot militate against the idea that the statute "expressly" deals with the disposition of profits during the year in question. See G. B. R. Oil Corporation v. Commissioner, 40 B. T. A. 737.

It is argued that in any event, the corporate charter cannot be construed to be a "written contract executed by the corporation prior to May 1, 1936" within the meaning of the statute.

At the outset it should be mentioned that the date of incorporation was some ten years prior to 1936, therefore there is no difficulty as to this portion of the quoted clause.

The principle that a corporate charter is a contract between the state and the corporation and its members was established in Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, and has been reaffirmed many times. The argument, however, is that the articles of incorporation are not "executed by the corporation" but are executed by its incorporators, and that the incorporators are not agents of the corporation since there cannot be an agency before the existence of the principal.

Be that as it may, the fact remains that by accepting the corporate charter, the corporation became bound by the acts of the incorporators in so executing the articles, whether we rely upon a theory of novation, ratification, or continuing offer.

It is worthy of note that the law of the State of Washington is that a corporation may "ratify" the preorganization contracts of its incorporators and thus become a party to the contract. See Walnut Park Lumber & Coal Co. v. Roane et al., 17 Pac. (2d) 896, 898 (Wash. 1933) wherein the court said,

"If promoter Kelly, who later became manager and president of the corporation, made contracts, prior to incorporation, in the interests of the corporation, and those contracts were approved by the company subsequent to incorporation, such ratification is binding upon the corporation."

We do not believe that Congress intended the word "executed" to have such a narrow meaning as to exclude the act of becoming bound by ratification. As stated in 23 Corpus Juris 278,

"The words 'execute,' 'executed,' and 'execution,' when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion. Thus when the terms are applied to a written instrument, they include the performance of all acts which may be necessary to render it complete as an instrument importing the intended obligation, of every act required to give the instrument validity or to carry it into effect or to give it the forms required to render it valid."

The Supreme Court has said that a statute should be construed to avoid not only the conclusion that it is unconstitutional, but also grave doubts as to its constitutionality. Linder v. U. S. 286 U. S. 5, 17.

This impels the conclusion that the Act in question should be construed so as to include the taxpayer's corporate charter within the term "written contract executed by the corporation, etc." There seems to be grave doubts as to whether there is a reasonable basis for

discrimination between a written contract actually "signed" by a corporation prohibiting the payment of dividends, and the contract of the charter to which the corporation is as fully bound, likewise prohibiting the distribution of profits. The "administrative convenience," which we have above held lends a basis for the distinction between oral and written contracts, would not seem to apply with equal force to this situation.

In the view that we take of the case it is unnecessary for us to consider the remaining contention of the taxpayer, that the Act is an attempt to control distribution of profits, a matter reserved to the states by the Tenth Amendment of the Constitution; and the contention of amici curiae that the tax is on the stockholder's share in the taxpayer's accumulated profits which is not authorized by the Sixteenth Amendment.

Reversed.

HANEY, Circuit Judge, dissenting.

Elaborate argument may be made that as a general rule the charter of a corporation is considered to be a contract [1] in certain branches of the law in order to bind a corporation for acts of its promoters, but I believe such an argument is inapposite here. A question as to the liability of a corporation for the acts of a promoter, or for violation of its charter, is not presented. The question presented is whether a corporate charter is "a written contract executed by the corporation" within the meaning of Sec. 26 (c) (1 and 2) of the Revenue Act of 1936.

It is clear that the quoted words might have been used in either of two senses, i. e. (1) a written contract "binding on" the corporation; or (2) a written contract "signed by" the corporation. The majority hold that the first sense was intended. I disagree, because such a construction renders the words "executed by" superfluous. Had such words been intended in the sense of "binding on" such idea would have been as fully expressed by simply saying "a written contract of a corporation." If there was a contract, it was binding on the corporation, and it was unnecessary to say more. Furthermore, had such sense been intended, it could and, I believe, would have been expressed unambiguously by saying "a written contract binding on the corporation." It seems clear to me that the construction given the words "executed by" by the majority renders them superfluous and meaningless.

One rule of statutory construction is stated in Platt v. Union Pacific R. R. Co., 99 U. S. 48, 58, that

"* * * a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute * * *"

I believe the construction of the majority violates that rule. On the other hand, the word "executed" is given significance by construing

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[1] See 3 Paul & Mertens, Law of Federal Income Taxation, Sec. 32A.43 (p. 352 et seq. 1938 Cum. Supp.).

it as being used in the sense of "signed." I believe that meaning should be given to the word here.

In this connection, both parties rely on the legislative history of the statute. I think such history is not helpful here because considerable revision of proposed bills leading to enactment of the statute in question was made "in conference without any new statement of legislative intent." 3 Paul & Mertens, Law of Federal Income Taxation Sec. 32A.01 (1938 Cum. Supp.).

Independently of the foregoing I think we are required to construe the word "executed" in the sense of "signed" because of the following from White v. United States, 305 U. S. 281, 292:

"* * * Moreover, every deduction from gross income is allowed as a matter of legislative grace, and 'only as there is clear provision therefor can any particular deduction be allowed * * * a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.' * * *"

Here it is not at all "clear" that appellant is entitled to the deduction.

Having reached the conclusion that "executed" in the statute means "signed," it is necessary to determine whether "a written contract" includes a corporate charter. I think it does not. Properly construed, I think the statute means only those written contracts which are "signed" on behalf of the corporation. The articles of incorporation which become the charter of the corporation, are not signed by the corporation, but are signed by the incorporators. The articles are simply a step in the formation of the corporation. "The promoters of a corporation are not in any sense the agents of the corporation before it comes into existence, for there cannot be an agency unless there is a principal." 18 C. J. S. 522, Sec. 120.

The remaining contentions argued are that the act in question is unconstitutional. The historical background of the act may be found in Martin, Taxation of Undistributed Corporate Profits, 35 Mich. L. Rev. 44.

Petitioner contends that the act is an attempt to control distribution of profits, a matter reserved to the states by the Tenth Amendment of the Constitution. Amici curiae contend that the tax is one of the stockholder's share in the petitioner's accumulated profits which is not authorized by the Sixteenth Amendment; that the actual purpose of the act is to regulate economic conduct under the thin guise of raising revenue and is a penalty on conduct; and that actually the tax is one on capital which is not authorized by the Sixteenth Amendment.

I think each of these contentions confuses purpose with motive. The purpose of the act is expressed therein when it levies a tax upon "net income" to be measured by a percentage of "undistributed net income." It may be that the things or reasons which motivated the expression of the purpose by Congress were not, considered alone, within the power of Congress. However, we are not concerned with

the motives of Congress. Sonzinsky v. United States, 300 U. S. 506, 513 contains much of pertinence:

"Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect * * * and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed * * *

"Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts * * * They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution * * *"

It is enough if one purpose is within the Congressional power, notwithstanding there may have been other purposes, which, considered alone, Congress had no power to make effective. Stephenson v. Binford, 287 U. S. 251, 276; Hampton & Co. v. United States, 276 U. S. 394, 412. See also: Henneford v. Silas Mason Co., 300 U. S. 577, 586. Wholly apart from these views, I think Helvering v. Nat. Grocery Co., 304 U. S. 282, precludes us from upholding the contentions made.

Finally, both petitioner and amici curiae contend that the act unreasonably discriminates between written and oral contracts prohibiting distribution of earnings and profits, in violation of the Fifth Amendment of the Constitution. "The power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is reasonable, and not merely arbitrary and capricious, the FifthAmendment can not apply." Barclay & Co. v. Edwards, 267 U. S. 442, 450. "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it." Carmichael v. Southern Coal Co., 301 U. S. 495, 509. The rule applies to the Federal government. Steward Machine Co. v. Davis, 301 U. S. 548, 584.

Respondent states in his brief: "It is a comparatively easy matter for the Bureau of Internal Revenue to ascertain whether an ordinary written contract prohibits payment of dividends. But it would be an almost insuperable burden for the Bureau to determine the validity and scope of oral contracts of that nature." I think it is apparent that the difficulties which would arise regarding the proof of an oral contract, and its validity, including the effect of statutes of fraud, form a rational basis for the classification. "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the differences between the treatment of small incomes or small taxpayers and that meted out to others." Carmichael v. Southern Coal Co., supra, 511.

See also Madden v. Kentucky, — U. S. —, January, 29, 1940. Reason compels the conclusion here that likewise administrative convenience and expense are a rational basis for the classification made.

I think the decision should be affirmed.

[Endorsed:] Opinion and Dissenting Opinion. Filed Mar. 1, 1940. Paul P. O'Brien, Clerk.

Judgment

United States Circuit Court of Appeals for the Ninth Circuit

No. 9207

NORTHWEST STEEL ROLLING MILLS, INC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is reversed.

[Endorsed.] Filed and entered March 1, 1940. Paul P. O'Brien, Clerk.

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-one (91) pages, numbered from and including 1 to and including 91, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the respondent, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of May A. D. 1940.

[SEAL] (Sgd.) PAUL P. O'BRIEN,
Paul P. O'Brien,
Clerk.

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Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument immediately following No. 8.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1940